

U.S. Department of Labor Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

Benefits Review Board
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BRB Nos. 16-0259 BLA
and 16-0260 BLA

ADELE S. DAVIS)
(o/b/o and Widow of JAMES A. DAVIS))

Claimant-Respondent)

V.)

CLINCHFIELD COAL COMPANY/)
PITTSTON COMPANY)

Employer-Petitioner)

DATE ISSUED: 11/23/2016

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim (2008-BLA-5631 and 2011-BLA-5605) of Administrative Law Judge John P. Sellers, III, rendered on a miner's subsequent claim¹ and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The miner filed his most recent claim for benefits on January 8, 2004. The district director awarded benefits in the miner's claim on September 15, 2004, and employer requested a hearing before the Office of Administrative Law Judges (OALJ). Administrative Law Judge Edward Terhune Miller conducted a hearing on November 19, 2008. Upon Judge Miller's retirement, the case was reassigned to Administrative Law Judge Pamela Lakes Wood on August 4, 2010.

The miner died on October 31, 2010, and by Order issued on December 10, 2010, Judge Wood remanded the miner's claim to the district director for consolidation with his widow's application for survivor's benefits. Claimant² filed her survivor's claim on December 21, 2010, and on December 28, 2010, the district director issued a Proposed Decision and Order, finding that claimant was derivatively entitled to benefits pursuant to Section 422(l) of the Act, 30 U.S.C Section 932(l) (2012).³ The consolidated claims were

¹ The miner's initial claim for benefits, filed on January 30, 1984, was denied on November 14, 1984, by reason of abandonment. Director's Exhibit 1-M.

The miner's second claim, filed on March 8, 1990, was denied because Administrative Law Judge Robert J. Feldman found the evidence insufficient to establish that the miner's pneumoconiosis was a contributing factor to his total disability. The Board affirmed the denial of benefits. *Davis v. Clinchfield Coal Co.*, BRB No. 92-2707 BLA (Feb. 24, 1994)(unpub.). Following the miner's three requests for modification, the claim was finally denied by the district director on March 17, 1998. Director's Exhibit 1-M.

² Claimant is the widow of the miner. In addition to her claim for survivor's benefits, claimant is pursuing the miner's claim on behalf of his estate. 2013 Hearing Transcript at 4.

³ Section 422(l) of the Act, 30 U.S.C. §932(l)(2012), provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis.

returned to the OALJ, and a hearing was conducted by Administrative Law Judge Richard Stansell-Gamm. Upon Judge Stansell-Gamm's retirement, the case was reassigned to Administrative Law Judge John P. Sellers, III (the administrative law judge).

The administrative law judge credited the miner with "approximately twenty years" of coal mine employment at an underground mine site, and adjudicated the miner's subsequent claim pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725.⁴ The administrative law judge determined that the miner's previous claim had been denied on the ground that the evidence was insufficient to establish disability causation. The administrative law judge found that the new evidence in the miner's claim was insufficient to establish that the miner's total disability was due to pneumoconiosis and, therefore, failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.⁵ Accordingly, benefits were denied in the miner's claim.

In the survivor's claim, the administrative law judge found that because the miner was not entitled to benefits at the time of his death, claimant was not automatically entitled to survivor's benefits pursuant to Section 422(I). Based on the filing date of the survivor's claim, the administrative law judge applied Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),⁶ and found that claimant established total respiratory or

⁴ The administrative law judge determined that the amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the miner's claim, as it was filed prior to January 1, 2005. Decision and Order at 19.

⁵ Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

⁶ Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner worked at least fifteen years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. Once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not

pulmonary disability pursuant to 20 C.F.R. §718.204(b) and was entitled to invocation of the Section 411(c)(4) presumption of death due to pneumoconiosis. Finding that employer failed to establish rebuttal of the presumption, the administrative law judge awarded benefits in the survivor's claim.

On appeal, in BRB No. 16-0260 BLA,⁷ employer asserts that the award of benefits in the survivor's claim must be vacated, arguing that the administrative law judge lacked jurisdiction to adjudicate the survivor's claim after he denied benefits in the miner's claim. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's arguments and affirm the award of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁸ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that because the district director did not fully process the survivor's claim, the administrative law judge erred in adjudicating it pursuant to Section 411(c)(4) after he determined that claimant was not derivatively entitled to survivor's benefits. Employer asserts that, just as a request for modification of a claim cannot be initiated before an administrative law judge, all claims must be initiated at the district director level and pass through all procedural stages, including issuance of a Notice of Claim, a Schedule for the Submission of Additional Evidence, and a Proposed Decision and Order. Employer further argues that it had "evidence and arguments specific to the survivor's claim that it was not permitted to assert during this process." Employer's Brief at 6.

have pneumoconiosis, or that no part of his death was caused by pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

⁷ Employer does not challenge the administrative law judge's denial of benefits in the miner's claim, and claimant has not filed an appeal. Employer's Brief at 3. Consequently, we dismiss the appeal in the miner's claim (BRB No. 16-0259 BLA).

⁸ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1-M, 4-M.

The Director counters that 20 C.F.R. §725.463⁹ “expressly allows an administrative law judge to address issues not reviewed by the district director,” and that employer is “simply incorrect” in its assertion that a claim must pass through all steps at the district director level before being adjudicated by an administrative law judge. Director’s Brief at 4. The Director points to the regulation at 20 C.F.R. §725.418(a), which provides, in pertinent part, that a district director may issue a Proposed Decision and Order *at any time during the adjudication of any claim* if it is authorized or required by 20 C.F.R. Part 725, or if the district director determines that its issuance will expedite the adjudication of the claim. 20 C.F.R. §725.418(a)(1), (2) (emphasis added). The Director notes that after claimant filed her survivor’s claim this case, the district director issued a Proposed Decision and Order awarding automatic benefits pursuant to Section 932(l), which did not become final due to employer’s request for a hearing. Thus, the Director argues that once automatic entitlement became unavailable, the administrative law judge could appropriately address other avenues of entitlement during his *de novo* review of the survivor’s claim. Lastly, the Director maintains that even if there had been a procedural defect, employer failed to show that it suffered any prejudice as a result. Director’s Brief at 2-5.

We agree with the Director’s position. There is no regulatory prohibition against an administrative law judge awarding benefits in a survivor’s claim under an alternative method of entitlement after determining that derivative entitlement was not available to claimant, especially where, as here, employer stipulated to, and raised issues in connection with, the survivor’s claim at the hearing, and developed, designated and submitted evidence before the administrative law judge. 2013 Hearing Transcript at 11-15, 24; Decision and Order at 28-31. Moreover, as the Director correctly asserts, employer has not shown how it was prejudiced from its inability to present its evidence and defenses before the district director. *See Sextet Mining Corp. v. Whitfield*, 604 Fed. Appx. 442, 445 (6th Cir. 2015); *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 24 BLR 2-155 (10th Cir. 2009). Lastly, we reject employer’s argument that this situation is analogous to a modification proceeding, as modification proceedings are specifically governed under 20 C.F.R. §725.310.¹⁰ As employer raises no other legal issues, nor any

⁹ Section 725.463 provides, in pertinent part, that if a new issue is raised, the administrative law judge may, in his or her discretion, either remand the case to the district director with instructions for further proceedings, hear and resolve the new issue, or refuse to consider such new issue. 20 C.F.R. §725.463(b).

¹⁰ Section 725.310 states, in pertinent part, that “modification proceedings shall not be initiated before an administrative law judge or the Benefits Review Board.” 20 C.F.R. §725.310(b).

substantive challenge to the administrative law judge's findings on the merits of entitlement, we affirm the award of benefits in the survivor's claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, the administrative law judge's Decision and Order Denying Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim is affirmed.
SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge